149 U.S. 277

RECORD, CASE NO. 13845.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 235.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

JOHN W. HUMPHRIES AND MOSES MOCK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

FILED OCTOBER 21, 1889.

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1 In the circuit court of the United States, ninth circuit, district of California.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
JOHN W. HUMPHRIES AND MOSES MOCK, DEFENDANTS.

Complaint.

Now comes the above-named plaintiff by its attorney, S. G. Hilborn, esq., and complains of the above-named defendants, and for causes of action alleges:

That on the first day of May A. D. 1866, the plaintiff was and for a long time prior thereto had been, and ever since has been and still is, the owner and seized in fee and entitled to the possession of all those certain tracts or parcels of land lying and being situate in the county of Fresno, State of California, and particularly described as follows: Being the east half of the southeast quarter section nine, southwest quarter, and the east half of the southeast quarter section ten, northwest quarter, and west half of the northeast quarter of section fifteen, township ten south, range twenty-four east, Mount Diablo meridian, together with all the trees growing and being thereon, and all the appurtenances belonging to said land.

That the defendants, on the first day of May, A. D. 1866, and at divers times between that day and the thirty-first day of December, A. D. 1874, while the plaintiff was owner in fee and seized of said land and the timber and trees growing and being thereon, wrongfully and unlawfully, and without the consent of plaintiff, cut and caused to be cut the following timber, then and there being and growing upon the said above-described land, the same being then and there the property of the United States; that is to say, three thousand pine trees; and they, the said defendants, then and there manufactured the same into lumber, and the said three thousand pine trees produced nine million feet of lumber.

And plaintiff further alleges that said lumber was of the value of ninety thousand ($90,000) dollars.

2 And plaintiff further alleges that the said defendants wrongfully and unlawfully, and without the consent of plaintiff, took said lumber heretofore described from the possession of said plaintiff and still unlawfully withhold and detain said goods and chattels from the possession of the plaintiff, to the plaintiff's damage in the sum of ninety thousand ($90,000) dollars.

Wherefore the plaintiff demands judgment against the said defendants in the said sum of ninety thousand dollars, the value of the said goods and chattels, with five thousand dollars damages and costs of suit.

S. G. HILBORN,
United States Attorney.

(Endorsed:) Filed July 23, 1884. L. S. B. Sawyer, clerk. By F. D. Monckton, deputy clerk.

3 United States of America. Circuit court of the United States, ninth circuit, district of California.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
JOHN W. HUMPHREYS AND MOSES MOCK, defendants.

Action brought in the said circuit court and the complaint filed in the office of the clerk of said circuit court in the city and county of San Francisco.

Summons.

The President of the United States of America, greeting: To John W. Humphries and Moses Mock:

You are hereby required to appear in an action against you by the above-named plaintiff, in the circuit court of the United States, ninth circuit, in and for the district of California, and to file your plea, answer, or demurrer to the complaint filed therein (a certified copy of which accompanies this summons) in the office of the clerk of said court, in the city and county of San Francisco, within ten days after the service on you of this summons, if served in this county; or if served out of this county, then within thirty days, or judgment by default will be taken against you.

The said action is brought to obtain a judgment against you and each of you for the sum of ninety thousand dollars alleged to be due said plaintiff, being the value of nine million feet of lumber manufactured from pine trees, the goods and chattels of said plaintiff, and wrongfully and unlawfully taken and withheld from the possession of said plaintiff by said defendants, and for the further sum of five thousand dollars damages and for costs of this action, and if you fail to appear and plead, answer, or demur, as herein required, judgment by default will be entered against you and each of you, and the plaintiff will apply to the court for the relief demanded in the complaint herein.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 23rd day of July, in the year of our Lord one thousand eight hundred and eighty-four and of our Independence the 109th.

[SEAL.]

L. S. B. SAWYER,
Clerk,
By F. D. MONCKTON,
Deputy Clerk.

4 (Endorsed:)

UNITED STATES MARSHAL'S OFFICE,
DISTRICT OF CALIFORNIA.

I hereby certify that I received the within writ on the 24 day of July, 1884, and personally served the same on the 30 day of July, 1884, by delivering to and leaving with John W. Humphreys and Moses Mock,

said defendants named therein personally, at the county of Fresno, in said district, a certified copy thereof, together with a copy of the bill of complaint, certified to by L. S. B. Sawyer, U. S. Cir. Ct. attached thereto.

San Francisco, Aug. 1st, 1884.

M. M. DREW,
U. S. Marshal.

By P. D. DUNLAP,
Deputy.

Filed August 1st, 1884. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

In the United States circuit court, ninth circuit, district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JOHN W. HUMPHRIES AND MOSES MOCK, DEFENDANTS. } No. 3416.

Demurrer.

Now comes the above-named defendants and demur to the complaint herein on the ground that the same does not state facts sufficient to constitute a cause of action.

Wherefore defendant pray judgment for costs of suit.

S. J. HINDS,
Attorney for Defendant.

I certify that the above demurrer is well founded in point of law.

S. J. HINDS,
Attorney for Defendant.

5 (Endorsed:) Service of copy of within demurrer acknowledged Aug. 31st, 1885. S. G. Hilborn, U. S. attorney. Filed August 31, 1885. L. S. B. Sawyer, clerk.

At a stated term, to wit, the November term, A. D. 1885, of the circuit court of the United States of America of the ninth judicial circuit, in and for the district of California, held at the court room in the city and county of San Francisco, on Monday, the 4 day of January, in the year of our Lord one thousand eight hundred and eighty-six.

Present: The honorable George M. Sabin, U. S. district judge of Nevada.

THE UNITED STATES OF AMERICA
v.
J. W. HUMPHRIES ET AL. } No. 3416.

Certified copy of order overruling demurrer, &c.

By consent of the respective counsel it is ordered that the demurrer herein be, and the same hereby is, overruled and that the defendants have to and including the 5th instant to answer herein.

I hereby certify that the foregoing is a full, true, and correct copy of an original order made & entered in the above-entitled cause.

Attest my hand and the seal of said circuit court this 24 day of April, A. D. 1888.

[SEAL.]

L. S. B. SAWYER,
Clerk.

By F. D. MONCKTON,
Deputy Clerk.

6 In the United States circuit court, ninth circuit district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JOHN W. HUMPHRIES AND MOSES MOCK, DEFENDANTS.

Answer.

Come now the defendants herein and, answering the complaint herein, deny each and every allegation in the complaint contained.

Wherefore defendants pray judgment for their costs.

S. J. HINDS,
Attorney for Defendant.

(Endorsed:) Service of the within answer & receipt of a copy thereof admitted this 5th day of January, 1886.

S. G. HILBORN,
U. S. Attorney.

Filed Jan'y 5, 1886. L. S. B. Sawyer, clerk.

In the circuit court of the United States, ninth circuit, northern district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JOHN W. HUMPHRIES ET AL., DEFENDANTS.
No. 3416.

Verdict.

We, the jury, find in favor of the defendants.

H. C. MACY,
Foreman.

(Endorsed:) Filed April 24, 1888. L. S. B. Sawyer, clerk. By F. D. Monckton, deputy clerk.

7 United States of America. Circuit court of the United States, ninth judicial circuit, northern district of California.

THE UNITED STATES OF AMERICA
vs.
J. W. HUMPHRIES AND MOSES MOCK.
No. 3416.

Certified copy of judgment.

This cause having come on regularly for trial on the 24th day of April, 1888, being a day in the February, 1888, term of said court, before the

court and a jury of twelve men duly impaneled by the clerk of said court, Jackson Hatch, esq., assistant U. S. attorney, appearing on behalf of the United States, and S. J. Hinds and W. H. Cook, esqs., appearing on behalf of the defendants, and the evidence on behalf of the respective parties having been introduced, and closed, and the cause, after arguments of counsel, and the instructions of the court, having been submitted to the jury, and the jury having subsequently rendered the following verdict: "We, the jury, find in favor of the defendants;" and the court having ordered that judgment be entered herein in accordance with said verdict:

Now, therefore, by virtue of the law, and by reason of the premises aforesaid, it is considered by the court, that the plaintiff take nothing oy this action, and that the defendants go hereof without day.

Judgment entered April 24th, 1888.

L. S. B. SAWYER,
Clerk.

I hereby certify that the foregoing is a full, true, and correct copy of an original judgment entered in the above-entitled cause.

Attest my hand and the seal of said circuit court this 24th day of April, A. D. 1888.

[SEAL.] L. S. B. SAWYER,
Clerk.

(Endorsed:) Filed April 24th, 1888. L. S. B. Sawyer, clerk.

8 In the circuit court of the United States, ninth judicial circuit, in and for the northern district of California.

THE UNITED STATES OF AMERICA
vs.
J. W. HUMPHRIES ET AL. } No. 3416.

Clerk's certificate.

I, L. S. B. Sawyer, clerk of the circuit court of the United States for the ninth judicial circuit, northern district of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment roll in the above-entitled action.

Attest my hand and the seal of said circuit court, this 24 day of April, 1888.

[SEAL.] L. S. B. SAWYER,
Clerk.

By F. D. MONCKTON,
Deputy Clerk.

(Endorsed:) Judgment roll. Filed April 24th, 1888. L. S. B. Sawyer, clerk. By F. D. Monckton, deputy clerk.

9 In the circuit court of the United States for the ninth circuit, in and for the northern district of California.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
J. W. HUMPHRIES AND MOSES MOCK, DEFENDANTS. } No. 3416.

Bill of exceptions.

Be it remembered this cause was tried in this court in the month of April, 1888, before a jury, and at the trial the following proceedings were had:

Testimony for plaintiffs:

J. N. ASHEY, a witness for plaintiffs, being sworn, testified as follows: I reside on Pine Ridge, Fresno County, California, and went there first in 1867, and have not resided there constantly, but from time to time. Was there every summer from 1867 to 1875, and had charge of sheep there, and was at different parts of the country. Now reside on section nine, on the southeast quarter, on the southwest part of that quarter. Have lived there ten or eleven years. Have known defendants since 1867. From that year to 1871 or 1872 they were engaged in sawmilling. I have seen them cutting and sawmilling. Their mill was on the southeast quarter of the southeast quarter of section nine. It is about two hundred yards from where I lived all the time. The mill was known as the Humphries and Mock Mill. They operated that mill all of four or five years, and it was then moved to section ten. Mock and Humphries built the mill on section nine, and they operated it. There was no other mill in that section of country except that at that time. It was some time between 1870 and 1874 that the next mill was built in that section of the country. It was called the Clipper Mill, and it was built further up.

From the time this mill was built there in 1867 the Humphries and
10 Mock Mill, until after it was moved to section ten, some six or seven or eight years, there was no mill in that country. Defendants obtained some of the timber that they operated the Humphries and Mock Mill with during those six or seven years on sections nine, ten, and fifteen. They did not cut much on section nine. They cut on the southeast quarter of section ten and on the northwest quarter of section fifteen. The place named where timber was obtained from was situated uphill from the mill. There was a ridge of hills or mountains around that mill on both sides—east and west and south. I think the most cutting was done on sections ten and fifteen, the portions that I have described. The timber was thicker there than at other places. They left a great deal of timber there. They cut sugar pine, yellow pine, fir, and cedar, but mostly sugar pine and fir. The lumber season began sometimes in May, and sometimes they stopped in September, and sometimes later. To the best of my knowledge they operated this mill at least five years. And they cut this timber into lumber. The lumber was hauled down off the mountains into the valley, and I believe most of it was sold at the mill. I did not live right where this timber was cut, but passed there and spent the summer there. This was during the hauling season. A good deal of timber was cut from the land lying right east from the northwest quarter

of section fifteen, but who cut it I can not say. I know the claim of L. B. Frazes, and there was cutting done there, and also I know the claim of Rose Baring, and there was cutting done there. The cutting that I refer to is the cutting done by those defendants during the period from 1867 to 1871 and 1872.

Cross-examination:

I went there in 1867 prospecting for mines; came back the same summer. First time I went was the latter part of June, 1867. I got into the snow on Granite Ridge, about ten miles from there. I visited this mill that was in operation twice. I do not remember the day or month, nor whom I saw there, nor what they were doing the day I was there in 1867. I did not go into the forest to examine what they were cutting. I was there in 1867 twice. There were no railroads there at that time. And the county seat was Milton, on the river. Humphries and Mock built the mill up there. There was no town in the valley in Fresno
11 County. The lumber cut up there that season was mostly bought by settlers in the valley. They could not have purchased it from any other place except from this mill in the mountains. That was the only resource they had at that time for lumber. I hauled some lumber down myself. The farmers went up to the mill from the valley and got the lumber and hauled it down to build their homes in the valley. The lumber that I hauled I hauled to Centreville down near the river. In 1868 I met a man hauling lumber down. In that year I went past that mill once. I did not stay there at all. I have examined the corners of that township first with Mr. Baker in 1881, when he surveyed it. In 1866, 7, 8, 9, I did not know anything about the corners. The road that I passed on went close to the mill, so that I could see what was going on as I passed. I was there twice in 1867, once in 1869. The lumber that I hauled to Centreville was for use in building. I hauled it to a lumber yard. I hauled only one load. That was in 1867 or 1868. I was up there nearly a month in 1867. I was right near the mill two or three times. They were operating at the mill when I was there. I did not go where they were cutting timber. Once afterwards I passed over the ground where they cut timber. I passed the mill more than once in 1868. I went by frequently. Every time I went by they were operating it. In 1869 I do not recollect being there at all, more than pass the mill. As to the defendants operating the mill I can not say positively; it was common report. Everybody said that Humphries and Mock owned the mill and were operating it. That is all that I know about it. A man by the name of Farrish did the framing on the mill, and Mock was there working, and Humphries was there too. When Humphries and Mock were there the mill was in the course of building. The mill was on the southeast quarter of the southeast quarter of section nine, and about two hundred yards from where I am located.

Re-cross examination:

It took some time to build the mill there in 1867. It was very unhandy for anything in those years. The defendants were having timber cut on the lands described in the complaint, but I do not suppose they cut it themselves. I know this from the men that cut it. They said that they were working for Humphries and Mock.

12 ROBERT E. HENDERSON, a witness for the plaintiffs, being sworn, testified as follows: I live up in the mountains in Fresno County. I know Pine Ridge. I was there in 1871 and 1872. In those years I ran an engine for Humphries at a mill called the Clipper Mill. I know where Ashey now resides. He was the last witness who testified. This Clipper Mill was something more than a quarter of a mile west, or nearly west from his place. There was no other mill in that section of the country at that time. It was a small mill, and ran both seasons of 1871 and 1872. It was run and operated by Humphries and Mock. As to the capacity of this mill, I hardly know, but suppose eight thousand or ten thousand feet a day. It was known as Clipper No. 1. The running season was as long as three months anyway. After the timber was manufactured into lumber it was hauled away from the mill by the people from the valley. The timber that we made into lumber was sugar pine and fir and yellow pine also. Mock operated the mill, and Humphries was around the yard nearly all the time. As far as I know I saw the trees from which the lumber was made coming in from the westward. I think that the hills around the mill are east and west. The mill was located at the foot of the mountain. It was down hill to the mill from where lumber taken. And that was the case to the north of the mill also. I do not think they cut much timber west of the mill. I was there in 1873, and in the same business. They moved the mill in 1873 or 1874, I do not know exactly, but they moved it about a mile and a half north. I know where Rose Baring's claim is now. That mill was on that claim. That is, the one that they moved in 1873 or 1874. I know a man named Littlefield, and where his claim is. This mill was moved to his claim. I worked for them in 1873. The first part of the season where the mill originally stood. I worked for them in all three seasons there.

Cross-examination:

A third of the time that I stated the mill ran, it was not operated at all. There were two small engines there only. In 1871 and 1872 we had a number of break downs. I suppose the defendants made but very little in operating the mill those three seasons. There was no railroad in that county at that time, and the county seat was Milton. The lum-
13 ber was mostly sold at the mill, for I saw people coming there for it.

H. CONVERSE, a witness for the plaintiffs, being sworn, testified as follows:

I live on Pine Ridge, Fresno County; went there August 16th, 1884; was there in 1887 with Messrs. Anderson and Jarvis; I have been over the lands described in the complaint several times with Messrs. Anderson and Jarvis. The land was measured by the surveys at that time. I know where the claims of Rose Baring and L. B. Frazier are; the latter is in section fifteen and the southeast quarter of section ten; I have been all over section ten. I saw where a mill had been on section nine; I know where Achey lives now; the mill site referred to is about west from his place a short distance. The country around that mill site is mountainous. Going from there north one would go down hill, and from there south and east, one would go up hill, and to the west, one would go down hill. Messrs.

Anderson and Jarvis; and I counted a great many tree stumps south and east of that mill site. There were yellow pine and sugar pine and fir stumps; the stumps generally averaged about four feet in diameter. The count we made was on the land named in the complaint. In some instances the tops of the trees that had been cut were there, and we measured across the butts of the logs and from where the top was to the stump; we always did this. In making the measurement, we took fifty or a hundred trees in each locality, averaging four feet in diameter. Some cuts of trees were twelve, some sixteen, some twenty, ans some twenty-four feet in length. On section fifteen we counted 657 sugar pine stumps, 294 yellow pines, and 132 firs, and 145 cedars. We only went over the part of that section that had been cut over. On section nine there were 40 sugar pine stumps, 140 yellow pines, 87 firs, and 21 cedars. In making the count on that section we did so on the part of it that was marked out by Mr. Jarvis, and those figures represent the actual number of stumps that we found there. On section ten we counted over parts that were marked out by Mr. Jarvis, and there were 471 sugar pine stumps, and 398 yellow pines, and 228 firs, and nine cedars. We did not count any trees that had been cut down by the shake-makers. A fair average diameter of the stumps that we found on these sections was three feet and a half.
14 And the average distance from the stumps to the tops of the trees that we found was about fifty feet. I am, and have been for about forty years a carpenter by occupation, and am accustomed to taking measurements.

Cross-examination:

These tree stumps were counted in 1887. We did not count those that had been recently cut, as far as we judge by looking at them. On parts of those sections, Mr. Jarvis counted, and on portions Mr. Anderson counted, and on portions I counted, and all the time we were in speaking distance of one another, and we afterwards took the count and averaged the result. Surveyor Jarvis told us what land we were to count on. In computing the amount of lumber in each tree, Messrs. Anderson and Jarvis used Spaulding's tables. The trees that we excluded from the count were on section two. The cutting had been done generally on section fifteen, and the stumpage there was all old, and also on sections nine and ten. I can tell whether a tree has been cut by shake-makers. I do not know anything about who hauled the shakes away or who cut them. As a rule the shake-makers made their shakes right on the ground where the tree was cut, and where a tree is cut by them the cut is very much shorter than in those that are cut for lumbering purposes.

H. W. JARVIS, a witness for the plaintiffs, was sworn, and he testified as follows:

I am and have been for over twenty years a practical surveyor. In 1887 I made resurveys for the Government; am familiar with the lands referred to in the complaint; have been all over them; made a survey of them in 1887 with Messrs. Converse and Anderson, with compass and chain in the ordinary method. We first ran the lines around the different sections where we found there had been cutting done to ascertain on what section it was, and what part of the section. After that we began to count the stumps, and did count all on that land except those that had been used

by the shake-makers. We made an estimate of the size of the tree that had been cut by measuring the stumps and the distance from them to the tops of the trees. We did this in order to get the number of logs that had been cut from each tree; we did not do it in all cases. Where there were only one or two logs this was easy to ascertain, but where
15 there were more we made the measurements. We averaged the stumps on the lands in question at thirty six inches in diameter, and allowed four cuts to each tree. We put the cuts at sixteen feet each in length, and used Spaulding's tables, a recognized standard, in arriving at the amount of lumber in each tree. We estimated 950 feet board measure to each cut of sixteen feet.

(The witness here gave the number of trees that had been cut on sections nine, ten, and fifteen, the same as the preceding witness.)

Cross-examination:

In making this count we went over the northwest quarter, and the west half of the northeast quarter of section fifteen. I suppose that we counted eighty or ninety stumps on section fifteen to take the general average of what a tree would produce, measured sufficient stumps on this line to give us an idea of what the average was; I do not remember just how many stumps we counted on each section in order to get an average of the size of the trees. We went up there to make an investigation and had to do it the best way we could. The logs were not there, and there was nothing but the tree stumps and sometimes the top of the tree left. The tree will sometimes jump after it has been cut, and we had to exercise our judgment. We did not positively know the length of any of the trees, and to ascertain as near as we could we had to measure from the stump to the top of the tree on the ground, and in some cases that was not accurate, for the reason that the trees would in some instances jump a distance after being cut. The investigation that we made applied to all of these cases, and we were engaged about two months in making it.

R. W. ANDERSON, a witness for the plaintiffs, testified as follows:

There is a mill site on the southeast quarter of section nine, and the land to the south of that is up hill, and to the west of it it is down hill, and to the north down a portion of the way. It crosses a low place and then it is up hill. To the east it is up hill and to the south it is up hill. Timber was cut south of this mill site on the hill, and on the hill to the east. Did not notice any cut north of the mill site, down the hill.

16 Cross-examination:

I know nothing as to who cut this timber, and nothing as to where it was cut except from the stumps that were counted. We got our average from the whole country at different places, and different sections and localities, and from a portion of sections fifteen and ten. I had a copy of the complaint in their action at the time the count of stumps was made.

JOHN W. HUMPHRIES, one of the defendants herein, was called as a witness for the plaintiffs, and he testified as follows:

I am one of the defendants in this action, and was at Pine Ridge from 1866 to 1873–'4, in business with Mr. Mock. Have lived in that vicinity since 1867. Was engaged in operating a mill there with Mr. Mock from

1867 to 1874, part of the time at what is called the Toll House, at the foot of the hill. We had a sawmill at that place, and it was called the Clipper Mill at first, and was built by Mr. Mock and myself in 1867. We maintained it there until 1872, and it was then moved east to the Littlefield claim. That was the first sawmill in that part of the country. There was one small sawmill in that part before we moved this mill to the Littlefield claim. It was probably a mile and a half to the south. We built this mill there to saw lumber for the purposes of sale. The land there was supposed to unsurveyed land. That was our supposition about it. We operated this mill and were in active business there from 1867 to 1872 or 1873, and were running this mill part of every season. When I first went there it had a capacity of seven or eight thousand feet of lumber a day, but afterwards we increased it eight or nine thousand feet a day, board measure was more than an average of its capacity. Mr. Mock and I generally directed the cutting of the timber. I think some of the timber was cut from the Rose Baring claim, and we got some east of where the mill was. I think the biggest part of the timber was brought to the mill from the south. Mr. Mock and I paid the men for cutting it. We sold the lumber to other people. During that time we generally sold it at nine and ten dollars a thousand feet. We sold generally all the lumber that was manufactured. I think that we manufactured during the whole time we were operating this mill there as much as three million feet of lumber, and sold it. I think some
17 of the timber came from the east a short distance. I have been over the woods, but never made cutting a part of my business. The timber was hauled in from the forest by oxen, up hill and down hill, as it happened to be. I suppose that we did our cutting within a radius about this mill of about a quarter of a mile, or a little over that. We might have gone further. There was no one else in there cutting at the time during that period. Considering the prices of lumber and the conditions under which we went there and the kind of a mill we had, we could not have afforded to pay anything for the trees as they stood in the forest. I do not think that the trees were worth a dollar each. It cost from six to seven dollars a thousand to manufacture the trees into lumber ready for market, and we sold the lumber at nine and ten dollars a thousand.

Cross-examination.

I went to Fresno City in 1866 and got the machinery we used from Mariposa County.

Question by defendant's counsel. With your operating there and the expense of the mill and the roads, did you make anything out of it?

(Objected to by plaintiffs as irrelevant, immaterial, and incompetent, as not tending to sustain the issues in the case, and as not being cross-examination.

Objection overruled by the court and an exception to the ruling taken by the plaintiffs.)

Answer of the witness. No, we never made anything.

Witness resuming: In 1867 Milton was the county seat of Fresno County. The railroad did not come in there until 1872–3. The only source of supply for lumber that persons had there was up in the mountains. We had an eight by ten engine, and ran that two years, and then got an-

other eight by ten engine. We did not know at that time the sections that we cut on, nor did we know where we cut. Do not know how much lumber we cut. Taking the value of making the lumber, the wear and tear of the plant, the timber could not have been worth over two dollars and a half an acre. A tree in the forest in 1867 was not worth anything because there was no one to manufacture it. In estimating the cost
18 of manufacturing lumber at six or seven dollars a thousand feet, I had in that estimate the wear and tear of the plant and machinery. We were not losing money in the business, but ere what we keep . this cost of lumber that I have given of six and seven dollars I estimate the value of my own and partner's labor and the expenses all the way through until we had the lumber sold.

MOSES MOCK, one of the defendants, was called as a witness for the plaintiffs and testified as follows:

Am one of the defendants in this action. We operated that mill referred to by Mr. Humphries from 1867 to 1872, and manufactured timber into lumber there. We went there for that purpose. We intended to manufacture the timber into lumber for the purposes of sale. And we did sell it after we manufactured it. We got the timber that we made into lumber at that mill within a radius around the mill of about a quarter of a mile. The mill was on the Rose Baring claim. I think that most of the timber that we got came from south of where the mill stood. Some from the east. We broke down frequently and did not get half a season. The boiler broke up one time, and the next time the engine broke all to pieces. We sold all the lumber that we made. We knew that was government land. We sold the lumber for different prices, all we could get for it. If it was a good season we would probably get a little more for it. We went there for the purpose of making lumber and money. We did not go there for the fun of it. I think that the estimate of Mr. Humphries of the cost of manufacturing lumber was about correct. As to the value of trees in the forest before they were made into lumber, when we put the mill there I do not suppose it was very much. We wanted it at that time. Before the road was there it was not worth anything. You could not have sold a tree for ten cents. Ten cents was a fair valuation for those pine trees at that time. After the country was opened out and more mills were there it would be worth more.

Cross-examination.

Question by the counsel for the defendant. I will ask you the direct question so as not to conceal anything: Did you and Mr. Humphries make anything by your operations?

19 (Objected to by plaintiffs as irrelevant, immaterial, and incompetent. Objection overruled and exception to the ruling by plaintiffs.)

Answer. If I was to come out with forty dollars a month I would be better satisfied than I am now.

WITNESS (resuming): One of our own roads cost us something over three thousand dollars. I do not think we made anything. There were no roads up there at all when we went there, and we sold all the lumber that we made to people around there in the valley. We never exported any lumber at all.

D. J. CHADWICK, a witness for the plaintiffs, testified as follows:

In 1883 I was a special agent of the Interior Department. Was making investigations of timber trespass in Fresno County. Saw the land in 1883 on sections nine, ten, and fifteen described in the complaint. They were generally cut over, and the timber was generally cut off from those sections. The best part of the timber had been cut off.

Counsel for the plaintiffs here offered in evidence, and it was duly admitted, an abstract of the records of the United States land office at Stockton, California, showing, among other things, that the lands named in this complaint were in township ten south, range twenty-four east, Mt. Diablo meridian, and that the claim of L. B. Fraser referred to in the testimony was a cash entry, number 8259, dated May first, 1884, embracing the north half of the northeast quarter of section fifteen, and the southeast quarter of the southwest quarter and the southwest quarter of the southeast quarter of section ten in said township; and that the claim of Littlefield, referred to in the testimony, was F. P., number 1816, of date August twenty-seventh, 1886, and embracing the east half of the northeast quarter and the northeast quarter of the southeast quarter of section ten in said township; and that the claim of Rose Baring, referred to in the testimony, was F. P., number 1400, of date April 28th, 1883, embracing the west half of the southwest quarter of section ten and the east half of the southeast quarter of section nine in said township; and that the claim of Samuel Funck, referred to in the testimony, was F. P., number 1168, of date March third, 1882, embracing the east half of the northeast quarter and the southeast quarter of the northwest quarter and the northeast quarter of the southwest quarter of section ten in said township; which said abstract was duly certified to and authenticated by the register of the said land office, and which showed that the official plat of said township as returned by the United States survey was filed in said land office on June 4th, 1881.

Testimony closed.

Counsel for both sides thereupon argued said cause before the jury.

Prior to the arguments being closed counsel for the plaintiff handed to the court, and requested the court to give and read to the jury as the law of the case, the following written instructions, numbers one, two, three, four, five, seven, eight, nine, and ten:

Title of court and cause.

No. 1. If a person enters upon public lands of the United States and there cuts, or causes or procures to be cut, any timber standing or growing thereon, without authority of law and not for the purpose of agriculture or mining, and with the sole purpose and intent of manufacturing said timber, when cut, into lumber and then selling said lumber to the public, and, in pursuance of such intent, does manufacture such timber into lumber and does offer it for sale and does sell it to the public, the United States are entitled to maintain against such person an action for the value of the timber so cut.

No. 2. If a person enters upon the public lands of the United States and cuts, or causes or procures to be cut, any timber standing or growing

thereon with the sole intent of selling or disposing of the timber to the public, or of manufacturing the timber into lumber and then selling such lumber to the public, he is responsible to the United States for the value of the timber so cut, in its original state, or after it was manufactured into lumber, according as the cutting is willful or by accident, mistake, or inadvertence.

No. 3. The law does not license the cutting of timber on the public domain by private persons for the purpose or with the intention of
21 selling or disposing of it. The only cases in which a private person is allowed to cut timber on the public domain are those of the agriculterist and mining settler, who find it necessary to do so in order to clear the land for the purposes of successful tillage or successful mining, and even in such cases it must be cut on their own claims, and no more timber than is sufficient for the purposes indicated is allowed to be cut from the public domain.

No. 4. Whoever cuts and removes timber from public lands must be prepared to show, when sued as a trespasser, lawful authority for his act.

No. 5. In an action of this character, if the jury find in favor of the plaintiff the amount of the damages is to be estimated in accordance with the following rule:

If they find that the person charged cut or procured or caused to be cut the timber on the public lands willfully, the verdict will be for the plaintiff for the market value of the timber, whether in its original state or manufactured into lumber, at any time after the cutting up to the commencement of the action, with no deduction for the labor or expense the person charged had in connection with it.

If, however, they find that the cutting was done by accident, or mistake, or inadvertently, the verdict will for the value of the timber at the time of the cutting, before the person charged had expended any labor or money in connection with it.

The jury must in either case ground their estimate of damages on the evidence before them.

No. 6. In a case of this character it should be the duty of the jury to first ascertain from the testimony if the person charged did cut or cause or procure to be cut any timber on the public land described in the complaint—if it be shown to be public land—of the kind referred to in the complaint; and if so, the amount thereof, and then, having ascertained the amount thereof, to see from the evidence if the cutting was done under circumstances in which the law authorized it to be done, and if it was done, and not under such circumstances, to then ascertain from
22 the evidence if the cutting was willful or not, and then, if willful, to ascertain from the evidence the value—the market value—of the timber either in its original state or manufactnred into lumber, at any time between the cutting and the commencement of the action, with no deduction for the labor and expense bestowed on the same by the person charged, but if not wilful, then to ascertain from the evidence the market value of the timber at the time it was cut, in its original state and before the person charged had bestowed upon it any labor or expense.

No. 7. One who goes upon the public land of the United States knowing that it is public land, for the sole purpose of cutting timber thereon, and who cuts timber thereon for the purpose of sale to the public, without being authorized so to do by the law, is a willful trespasser upon that land.

No. 8. One who enters upon public land of the United States knowing that it is public land, for the sole purpose of cutting timber and manufacturing the same into lumber for sale to the public, and who does, with such intent, cut timber thereon and manufacture it into lumber, without being authorized by the United States to do so, is a willful trespasser on such land, and he can not defend an action brought against him for the value of such lumber upon the ground that the land at the time of the cutting was not for sale by the United States, nor upon the ground that the community in which the lumber was sold was benefited thereby, nor upon the ground that the United States did for many years tacitly permit timber to be cut upon their public land by the early settlers or pioneers for their own use, nor can the history of the attitude of the United States towards the unlicensed cutting of timber on their public lands by early settlers or pioneers, nor can such history immediately contemporaneous with the trespass involved in the particular case be made available to the trespasser in such action. Nor do such circumstances, if they appear in any such action, afford the trespasser any ground of relief in the way of mitigation of damages.

No. 9. If one who knows that certain land is public land of the United States enters upon it with such knowledge, not as an agricultural
23 or mining claimant, but for the purpose and with the intent of cutting or causing or procuring to be cut thereon any timber, intending to manufacture the same into lumber for the sole purpose of sale to the public, and such person, after such entry, does, with such intent, cut or cause or procure to be cut thereon any timber and does manufacture the same into lumber for the purposes of sale to the public, and does sell the said lumber to the public, then the acts of such person are willful within the meaning of the law, and he is responsible to the United States for the market value of the lumber so manufactured from said timber, at any time after the said cutting up to the commencement of the action, whatever the evidence in the case may show such value to be, not exceeding the amount claimed in the complaint.

No. 10. In order to render a trespass upon the public lands of the United States a willful trespass in the meaning of the law it is not essential that the act be the result of or accompanied with any artifice or trick or device or secret fraud, nor that it be malicious or wanton. It is a willful trespass if it is committed knowingly and intentionally.

Each of said proposed instructions to the jury, so requested by the attorney for the plaintiffs, was by the court refused, and the court then instructed the jury as follows:

Gentlemen of the jury, this is an action brought in behalf of the United States against these defendants for and on account of certain alleged trespasses committed between the first of May, 1866, and the thirty-first of December, 1874. The amount sued for to this action is quite a large sum. The damages are laid at ninety thousand dollars, for the conversion of nine million feet of timber, alleged to have cut from this land, made into lumber and converted by the defendants during the dates which I have given you, between the first of May, 1866, and the thirty-first of December, 1874. You have heard the testimony in regard to the situation of this mill, and may be able to determine on what section of land the mill was situated. I leave it wholly to you. It is admitted by counsel

that in 1866 and up to 1881 that this land was public and unsurveyed land of the United States, and that it has been sectionized since 1881. It is a matter of fact, to be established the same as any other fact to
24 your satisfaction, where this mill of the defendants was located. It seems to be conceded, indeed, established, by their own testimony that it was in the neighborhood of these lands. Whether upon any portion of section nine, ten, or fifteen is a matter of fact to be established by evidence.

Mr. HATCH. Will your honor permit me to make one suggestion? This abstract which I offered and introduced in evidence showing that the claim of Rose Baring was upon the point alleged in the complaint and the testimony all shows that this mill was upon her claim.

Mr. COOK. That certificate does not show that that claim has ever been can*c*elled.

Mr. HATCH. All the testimony shows that the mill is located on that claim.

The COURT. I believe that is true. So far as any evidence goes that I have heard I am unable to say where the mill was located on that section. The jury heard the evidence, and it rests wholly with them to determine that as well as any other question of fact.

Now there has been a good deal of evidence in this case that seems to me to be somewhat foreign to it, and yet, perhaps, somewhat pertinent. Rather remotely, however, a good deal of it. You have heard the evidence of the parties who counted the stumps, Anderson, Jarvis, and Converse. You have heard the manner in which they performed that service on behalf of the Government, and also the mode and manner in which they arrived at their estimate of the amount of lumber which could or might be manufactured from each and every one of these trees, which they inform us they counted upon these sections. You are to remember that this count was made in 1887, just twenty years after these defendants, by their own admission, commenced to manufacture lumber in that country. Of course, I suppose, this testimony was offered in connection with other testimony that was to have been offered to raise the inference that these defendants cut all of this timber upon this specific land mentioned in the complaint. That is a matter of ev*e*d*i*nce wholly for you to determine, whether or not that has been shown to your satisfaction I may say to you; that in this, or in any suit, it devolves upon the
25 party seeking to fix a liability upon another party, to wit, it devolves upon the plaintiff in any suit to fix the liability upon the defendant on evidence clear, satisfactory, and convincing to your minds. It is a serious thing for a jury by its verdict to say that one man owes another man a certain sum of money, and they should be thoroughly satisfied in their minds in regard to the justice of their verdict before rendering it.

The same rule obtains in this case as in any other in that respect. You must be satisfied of the liability and the amount of the liability of the defendants to the plaintiffs before you are justified in rendering a verdict in favor of the plaintiffs. In actions of this kind for trespass or for damages for an alleged trespass there are two rules of law applicable in computing damages, if damages have been shown. We will come*t* to that afterwards. If you are satisfied from the evidence that the trespass committed by the defendants was a willful trespass and an intentional tres-

pass, it then was and is a wrong for which they must answer. The law in cases of that kind fixes the damages at a severe but just rule. Here was timber growing upon the public domain belonging to the United States; whoever cut and removed that timber wrongfully and willfully from the public domain and converted it to his own use was guilty of a wrong, and is liable to answer to the United States, not only for the value of the timber as it grew on the land but whatever value his own labor may have added to that. That is the rule in case of willful trespass. On the other hand, even though you should believe that the defendants may have been guilty of a wrong in going upon the public domain, and taking timber thereon, yet, if you should believe there was no willful purpose on their part to despoil the public domain, then the rule of damages would be the value of the timber as it stood upon the land before it was cut and removed therefrom—in other words, just the exact damages that the plaintiff has sustained by the removal of the timber from the land by the defendants. Those are the two rules that obtain in this case. In one sense whatever we do voluntarily is a willful act, but it is not the sense in which "willful" is to be used and applied in cases of this character. You are entitled, not only in this case, but in all cases, to consider the circumstances under which the trespass was committed. As you are , these alleged trespasses occurred nearly twenty-two years ago. It is a part of the history of the country and may be taken notice of by all that during many years, fifty or sixty, the Government has always been kind and considerate to the pioneers and early settlers. It has permitted them to a certain extent to cut from the public land such timber as might be required for their needs and necessities. I have had occasion to explain this in connection with these suits to other juries. I think that the first act passed by Congress was in 1833, making it penal to cut certain kinds of timber growing upon public land which had been reserved for Government uses. The settlement of the country went on continuously, however, thereafter as it had before. It is a matter of common knowledge that in the early settlement of the country the early settler had occasion to, and did use, for his necessities, timber growing upon the public domain. That was especially true where timber was scarce. It ran on in that way until 1878, I think, when the next act of Congress was passed making it unlawful for parties to go upon the public domain and cut timber for sale or export. You have a right to consider all of these circumstances. As I observed, it is a matter of common knowledge. The mode and manner in which the country was settled up, and the mode and manner in which the people utilized the timber on these public lands for their domestic use, to supply their needs, was known.

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You have a right to consider all of the circumstances of the case—these facts, in considering and determining whether, twenty-two years ago, the act of these defendants in going on the public lands in Fresno County, and establishing their mill, was a willful act within the law.

In regard to the matter of damages, gentlemen, if you determine it was willful, the rule of damages will be as I have given you. If you determine, on the other hand, that it was not so, the rule of damages, if any, would be the value of the timber that they may have cut as it stood on the ground. On that question, there being but little market for it, perhaps none, until, as they testified, the roads were open, so that the settlers could

get in and get lumber, the timber may not have had a very great value on the ground. The testimony is all before you on that point. You must determine the value of the lumber. It is testified to by the defendants that during the time from 1867 to 1872 or 1873, while they
27 were operating there, they sold this lumber for from eight to ten dollars a thousand. The cost of the lumber to them was from six to seven dollars to manufacture. I believe these are the main ideas that should control you in considering and determining upon your verdict in this case.

I say to you again, gentlemen, that in this, as in any case, you must be satisfied from the evidence of two facts: First, that these defendants did go upon the public domain and cut and remove therefrom timber, as alleged in this complaint. On that it may be conceded that they admit that they did go upon the public domain and cut therefrom certain kinds of timber. Whether it was upon the lands alleged in this complaint or not is wholly a matter for you to determine. If it was not on these particular subdivisions of these sections you are not to consider it, because the Government has limited itself in this action to these particular sections of land, and the particular subdivisions. Having determined that, you will then determine the damage, if any, that has been sustained by the Government by reason of these trespasses committed by these defendants. On these points, especially the latter, the evidence should be reasonably fair and fully satisfactory and convincing to your minds.

Counsel for the plaintiffs thereupon in due and proper time and manner excepted to the action of the court in refusing and omitting to give and read to the jury the said written instructions numbered from one to ten, inclusive, so requested, and in refusing and omitting to give and read each and everyone of said written instructions to said jury.

Thereupon the jury retired in proper manner, and thereafter duly came into court and declared in proper manner a verdict in favor of the defendants and against the plaintiffs.

Assignment of errors.

Plaintiffs here assign the following errors of law occurring at the trial:

First. The court erred in overruling the objection of the plaintiffs' counsel to the following question asked by the defendants' counsel of the witness Humphries: "With your operating there, and the expense of the mill and the roads, did you make anything out of it?" and in permitting said witness to answer the said question.

28 Second. The court erred in overruling the objection of the plaintiffs' counsel to the question asked by the defendants' counsel of the witness Mock: "I will ask you the direct question so as not to conseal anything; did you and Mr. Humphries make anything by your operations?" and in permitting the said witness to answer the said question.

Third. The court erred in refusing and omitting to give and read to the jury, as a part of its instructions, the written instructions numbered from one to ten, inclusive, and in refusing to and omitting to give and read to said jury each and every one of said written instructions so requested by the plaintiffs.

Specifications of the insufficiency of the evidence to justify the verdict:

Plaintiffs here specify the particulars where they claim that the evidence is insufficient to justify the verdict of the jury.

First. The evidence fails to justify the verdict of the jury because it appears affirmatively therefrom that the defendants owned and operated that Mock Mill, and also known as the Clipper Mill, located on the land now claimed by Rose Baring, being the land described in the complaint, for a long period of years; that they built the mill there and operated it there during that time for the purpose and with the intention of manufacturing timber taken by them from Government land, knowing such land to be Government land, for the purpose of sale; that they cut and removed large quantities of the timber to said mill from the surrounding country knowing that it was public domain of the United States; that such timber was by them made into lumber to the extent of at least three million feet, board measure, and was by them sold for prices ranging from eight to ten dollars a thousand feet, board measure, and that that was the market value of said lumber.

JNO. T. CAREY,
United States Attorney, Attorney for the Plaintiffs.

Settled and allowed July 24th, 1889.

GEO. M. SABIN, *Judge.*

(Endorsed:) Filed Sept. 17, 1888. L. S. B. Sawyer, clerk. Settled and refiled July 24th, 1889. L. S. B. Sawyer, clerk, by F. D. Monckton, depy. clk.

29 In the circuit court of the United States, ninth judicial circuit, in and for the northern district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF and plaintiff in error,
vs.
JOHN W. HUMPHRIES AND MOSES MOCK, DEFENDANTS and defendants in error.

I, L. S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit, in and for the northern district of California, do hereby certify that the foregoing twenty-eight written or printed pages, numbered from 1 to 28, inclusive, are a full, true, and correct copy of the record and of all proceedings in the above-entitled action, and that the same together constitute the return to the annexed writ of error.

Attest my hand and the seal of said circuit court this 16th day of September, A. D. 1889.

[SEAL.] L. S. B. SAWYER, *Clerk.*

30 UNITED STATES OF AMERICA, ss.

The President of the United States of America to the judges of the circuit court of the United States for the 9th circuit, northern district of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between

the United States of America, plaintiffs and plaintiffs in error, and John W. Humphries and Moses Mock, defendants and defendants in error, a manifest error hath happened, to the great damage of the said plaintiffs and plaintiffs in error, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said Supreme Court, to be there and then held, that the record and procedings aforesaid be inspected; the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 25th day of July, in the year of our Lord one thousand eight hundred and eighty-nine and of the independence of the United Snates the one hundred and fourteenth.

[SEAL.] L. S. B. SAWYER,
Clerk U. S. Circuit Court 9th Circuit, Northern District, Cal.

The above writ of error is hereby allowed.

GEO. M. SABIN, *Judge.*

31 *The answer of the judges of the circuit court of the United States for the northern district of Calfornia.*

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States of America within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court:

L. S. B. SAWYER, *Clerk.*

(Indorsed:) 3416. United States Supreme Court. The United States of America, plffs. in error, vs. John W. Humphries and Moses Mock, defts. in error. Writ of error. Filed July 31st, 1889. L. S. B. Sawyer, clerk U. S. circuit court northern district of California.

32 UNITED STATES OF AMERICA, ss.

To John W. Humphries and Moses Mock, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1889, pursuant to a writ of error filed in the office of the clerk of the circuit court of the United States for the northern district of California, in that certain action wherein the United States of America are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the error and judgment in the said action mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Geo. M. Sabin, acting judge of the circuit court of the United States, 9th circuit, northern district of California, this 31st day of July, A. D. 1889, and of the Independence of the United States the one hundred and fourteenth.

GEO. M. SABIN, *Judge.*

33 We hereby acknowledge due service upon us of a copy of the within citation this July 31, 1889.

WM. HOFF COOK and
S. F. LEEDS,
Attorney for Defendants.

(Indorsed:) 3416. In the Supreme Court of the United States. The United States of America, plaintiffs in error, vs. John W. Humphries and Moses Mock, defts. in error. Citation filed July 31st, 1889. L. S. B. Sawyer, clerk U. S. circuit court, northern district of California.

34 (Indorsement on cover:) No. 235. The United States, plaintiff in error, vs. John W. Humphries and Moses Mock. 13845. N. California C. C. U. S., filed October 21, 1889.